der each party to pay their own costs before us and before Abdul Wahab Ghows J. There will be the usual consequential order for the refund to the appellants or their solicitors of the amount deposited by the appellants as security for costs of the respondents in this appeal.

Order accordingly.

Solicitors: *Ramdas & Wong; Netto Low, Abraham & Partners.*

ANG ENG LEE & ANOR. v. LIM LYE SOON

[C.A. (Sinnathuray, Thean & Rajah JJ.) August 29, 1986]

[Singapore — Civil Appeal No. 42 of 1984]

Road Traffic — Motor accident — Infant knocked down by lorry — Negligence — Finding of facts by lower court reversed on appeal. — Lorry driver negligent and eight year old infant partly negligent.

Negligence — Infant 8 years old — Contributory negligence — Apportionment of liability.

Practice and Procedure — Findings of facts by lower court reversed.

Practice and Procedure — Accident cases — Question of negligence — Questions a trial judge should pose to himself.

Practice and Procedure — Personal injuries case — Injury to infant — Father's loss and expenses — Whether independent cause of action in father.

Damages — Infant claimant — Contributory negligence — Father's loss and expenses — Whether independent cause of action.

This appeal arose from a claim made in the District Court by the appellants against the respondent for damages for negligence arising out of a road accident in which the first appellant, an eight year old infant, was knocked down and injured by a lorry driven by the respondent. At the conclusion of the hearing in the District Court, the learned District Judge found that the defendant's version was the more probable one and dismissed the plaintiffs' claim. Against the decision, the plaintiffs appealed to the High Court. Kulasekaram J. also dismissed the appeal on the ground that the defendant was not travelling at an excessive speed at the time of the accident and was not in any way negligent. The plaintiffs appealed.

Held, by a majority (Sinnathuray J. dissenting): (1) the defendant was negligent in the driving of his lorry at the material time;

(2) the first plaintiff, though a young child of 8 years old, could not be regarded as too young to be incapable of contributory negligence. He could be expected to exercise reasonable care of not running across the road in the path of an oncoming lorry. He ought reasonably to have foreseen the danger. He was partly to blame for the accident and there was contributory negligence on his part;

(3) in view of his young age, the liability was apportioned as follows: two-thirds thereof to the defendant and one-third to the first plaintiff;

(4) the loss and expenses set out in the statement of claim, if proved, were those of the first plaintiff and he was entitled to recover them in this action; they arose out of his need for the services which in this case were paid for by the second plaintiff. The second plaintiff had no cause of action against the defendant and ought not to have been joined in the first place. The second plaintiff's appeal should therefore be dismissed.

Cases referred to:

(1) *Donnelly* v. *Joyce* [1974] 1 Q.B. 454.
(2) *Muthusamy* v. *Ang Nam Cheow* [1979] 2 M.L.J. 271.
(3) *Peter Thomas Mahon* v. *Air New Zealand & Ors.* [1984] A.C. 808, 814.

COURT OF APPEAL.

V Ramayah for the appellants.

Benedict Chan Tuck Kiang for the respondent.

Cur. Adv. Vult.

Thean J. (delivering the majority Judgment of the Court): The first plaintiff, an infant, was knocked down and injured by a motor lorry, No. YA 9087D, at Sungei Tengah Road on January 15, 1981. The lorry at the material time was driven by the defendant. Suing by his father and next friend, he brought this action against the defendant claiming damages for negligence; joined as the second plaintiff is his father who claimed damages for loss and expenses incurred on account of the injuries sustained by the first plaintiff. At the time of the accident, the first plaintiff was 8 years old and he lived with his parents at 96 Sungei Tengah Road in Chua Chu Kang. He said that on that day, at about 11.00 a.m., he left his house to catch a bus to go to school. He had to cross the road and before he crossed he looked at both sides, left and right, and saw no vehicle approaching; he then walked across the road. When he reached the other side of the road he was knocked down and lost consciousness. He said that when he was knocked down he was standing on the grass verge and not on the road; he was not facing the lorry and the nearside front part of the lorry hit him.

The claims were resisted by the defendant; he denied any negligence on his part. He said that on

that day he was driving his lorry along Sungei Tengah Road; he was on the left side of the road and was travelling slowly – 40 m.p.h., he said. As he was approaching the spot, where the accident took place, he suddenly saw a boy, *i.e.*, the first plaintiff, rushing across the road followed by a girl; the first plaintiff was only 1½ m. away from him. He applied his brakes and swerved the lorry to the left, but was unable to avoid colliding with the first plaintiff. According to him, the right front part of his lorry hit the first plaintiff.

The case was tried before the District Court and at the conclusion of the hearing, the learned District Judge held that the defendant was not negligent and dismissed the claim. Against that decision the plaintiffs appealed to the High Court which dismissed the appeal; the learned Judge held that the defendant was not travelling at an excessive speed at the time of the accident and was not in any way negligent. Against that decision this appeal is now brought.

The main thrust of the appeal is directed towards the findings of fact made by the learned District Judge. The learned District Judge recounted the two versions of the accident as given by the first plaintiff and the defendant respectively, and then posed the following questions: "The question was who was negligent? Was it the infant plaintiff or the defendant?" The learned District Judge then proceeded with his examination of the first plaintiff's and the defendant's versions of the accident and came to the conclusion that the defendant's version of the accident on the balance of probabilities was true and on that basis he found that the defendant was not negligent.

On this approach adopted by the learned District Judge in arriving at his finding we have two observations. First, it seems to us that it is more appropriate to approach the matter with the question: was the defendant negligent? If the defendant was not negligent, then that would conclude the matter. If the defendant was negligent, the next question is: was there any contributory negligence on the part of the first plaintiff? Secondly, in a case such as the present one, it is not really a question of accepting the defendant's version of the accident in preference to that of the first plaintiff. The first plaintiff, at the time of the accident, was only 8 years old, and at the time of the trial was about 10 years old. Obviously, not much weight really can be attached to his evidence as regards how the accident happened; in particular, his evidence that he was knocked down when he was on the grass verge and that it was the front nearside of the lorry that hit him could not be accepted, in view of the incontrovertible evidence that the front offside of the lorry was damaged and that blood stains were found on the road. As a matter of inference, the first plaintiff must have been hit by this part of the lorry and at the time of the impact he must have been on the road. However, having rejected the first plaintiff's evidence, the learned District Judge in our view should then have considered the evidence of the defendant and other evidence, both sworn and documentary, to determine whether the defendant was negligent. Now, the really substantive part of the evidence of the defendant is the following, given in examination-in-chief:

> "On January 15, 1981 I was driving lorry number YA 9087D along Sungei Tengah Road going towards Chua Chu Kang. I was on the left side of the road. I don't know how far from the grass I was driving. I horned. I saw nobody in front. I was travelling at 40 mph. I never looked. I don't know whether on my lorry it's kmh or mph. I was travelling slowly. I went up. I saw a boy. I could not – but I swerved, went to left to the grass. The boy ran. I can't see. He ran very fast. I could not see. He ran from here. (Indicates from right to left). When the boy ran I was about this distance away.
>
> (*Court:* About 1½ meters away). When I saw boy running I applied my brakes. I could not stop. I swerved to left and went to the grass. I turned fast. I applied brakes and turned. When I hit the boy, I was already on the grass.
>
> (Witness is asked to draw rough sketch. Witness draws sketch – admitted and marked D.5).
>
> I hit the boy in front on the right front of my vehicle. The right front of my lorry was damaged. (Witness is shown D.1 to D.3). The front right portion of my lorry, the van, hit the boy above the lights. When lorry stopped, I came down. I saw a small girl, I think the boy's sister. This girl was running behind the boy."

Purely on the basis of the defendant's evidence the learned District Judge found that the defendant was not negligent. He said:

> "Accepting the defendant's evidence as correct, I could not see how he could be said to be negligent. He was not speeding. He said he negotiated a bend before reaching the spot where the collision occurred. His view to the front was obstructed by thick vegetation on the side of the road and he sounded his horn. All of a sudden the infant plaintiff dashed across the road about 1½ metres away to his front. He jammed on his brakes and swerved left to avoid colliding into the infant plaintiff. Having regard to the circumstances what the defendant did was what that could be expected from a reasonable driver. He was certainly not negligent."

The defendant's evidence is not the whole of the evidence to be considered. There is the evidence of PW1, the police sergeant, who arrived at the

scene soon after the accident. He took measurements and drew a sketch plan of the scene of the accident which was accepted without any challenge. According to him, at the stretch of road where the accident took place there is a slight bend to the left; the road slopes slightly upwards and then downwards. The sketch plan shows a narrow road with a width of about 4 m. 10 cm. and also shows long tyre marks starting from points "J" and "K" leading to the point "H" where the vehicle came to a standstill and the length is 17 m. 20 cm. The telltale sign here is clearly the tyre marks, which are indicative that the defendant must have seen the first plaintiff and applied his brakes at the spot approximately just before his lorry reached the points "J" and "K" ; it is from these points the tyre marks appear. The lorry did not appear to have stopped until it reached the points "G" and "H" with about three quarters of its length on the bushes. According to PW 1, the bushes are about 2 to 3 feet high. It is clear to us that the bushes played an important part in bringing the lorry to a halt.

On this evidence, it is necessary to consider the question whether the defendant was driving the lorry at an excessive speed in the circumstances. According to him, he was driving the lorry at 40 m.p.h. though he subsequently attempted to qualify it by saying that he did not know whether the speedometer in his lorry recorded the speed in kilometer or mile; but he is a driver by occupation. At any rate, this speed was accepted by his counsel in his closing submission. The learned District Judge found that the defendant was not speeding. It is not clear to us, however, whether the learned District Judge was of the view that the lorry travelling at 40 m.p.h. was not speeding or that the lorry was travelling at a speed less than 40 m.p.h. and therefore was not speeding. Whatever might be the speed at which the lorry was travelling, the question still is whether it was travelling at an excessive speed in the circumstances. The stretch of road is a rural road with a width of 4 m. 10 cm. and with bushes of 2 to 3 feet high on the left and trees and vegetables on the right and has a slight bend to the left. The defendant said that he sounded the horn; that indicates that he was expecting either vehicles or pedestrians along the road. In these circumstances, he ought to slow down and drive at a speed at which he could take effective avoiding action should something untoward happen in front of him, as it did. According to him, as he was negotiating the bend, all of a sudden, the first plaintiff dashed across the road, from right to left, about 1½ meters away in front of him. This piece of evidence is inherently incredible. The first plaintiff could not suddenly appear from nowhere and dash across the road. The defendant must have seen him at a distance of more than 1½ meters away in view of the tyre marks, which start from the points "J" and "K". According to him, when the lorry collided with the first plaintiff it was on the side of the grass verge, which means that he must have collided with the first plaintiff at a point near "H". That is the point at which he swerved his vehicle to the left. So, at the time when he saw the first plaintiff running across the road, the latter must have been at least 10 meters away in front of his lorry; but he was not able to stop or swerve the lorry in time to avoid the collision. As a matter of inference, the defendant must have been driving his lorry at the speed which was excessive in the circumstances. We are therefore of the view that the defendant was negligent in the driving of his lorry at the material time.

We now turn to consider the question whether the first plaintiff was guilty of any contributory negligence. He was at the time of the accident 8 years old. Notwithstanding his young age, it is necessary to consider whether in the circumstances he had failed to exercise reasonable care expected of him in his situation. The road where the accident happened is a rural road and at the material time the defendant's lorry was the only vehicle travelling along there. The first plaintiff was on his way to school. According to him, he looked around to see if there was any traffic before he started to cross the road to catch a bus. He must have been familiar with the road. He must have heard, if he had not seen, the lorry coming; particularly the defendant sounded the horn. In the circumstances of this case, we think that the first plaintiff, though a young child of 8 years old, cannot be regarded as too young to be incapable of contributory negligence; he can be expected to exercise reasonable care of not running across the road in the path of an oncoming lorry; he ought reasonably to have foreseen the danger. In our opinion, he was partly to blame for the accident and there was contributory negligence on his part. In view of his young age, we apportion the liability as follows: two-thirds thereof to the defendant and one-third to the first plaintiff.

The second plaintiff claimed against the defendant the sum of $1,453 as special damages incurred on account of the injuries sustained by the 1st plaintiff. These are loss and expenses of the first plaintiff and not the second plaintiff. The second plaintiff has no cause of action against the defendant. In *Donnelly* v. *Joyce*,[1] the Court of Appeal

in England awarded as special damages to the infant plaintiff: (i) travelling expenses of the parents to and from hospital. (ii) costs of special socks and boots and (iii) loss of wages incurred by the plaintiff's mother while caring for the plaintiff. The third item was attacked on appeal. It was argued that the loss was that of the mother and not the plaintiff and there was no legal obligation on the part of the plaintiff to reimburse her. The Court of Appeal in response to such argument said, at pp. 461-462:

"We do not agree with the proposition, inherent in Mr. Hamilton's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, "in relation to someone else's loss," merely because someone else has provided to, or for the benefit of, the plaintiff – the injured person – the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant.

The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages – the purpose of the ascertainment of the amount of his loss – is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider"; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to pay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however, ascertained or defined, so to do. The question of legal liability to reimburse of the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer."

Hence, in the instant case, the loss and expenses set out in the statement of claim, if proved, are those of the first plaintiff and he is entitled to recover them in this action; they arose out of his need for the services which in this case were paid for by the second plaintiff. But the second plaintiff has no cause of action against the defendant and ought not to have been joined in the first place. His appeal is therefore dismissed.

We now make the following orders: we set aside the parts of the orders made by the District Court and the High Court insofar as they relate to the claim and appeal of the first plaintiff; an interlocutory judgment is to be entered for the first plaintiff and the case be sent back to the District Court for damages to be assessed and, when assessed, be apportioned in the proportions we have decided and final judgment be entered accordingly. The first plaintiff is to have his costs here and below. As regards the dismissal of the appeal of the second plaintiff, we disallow the costs thereof to the defendant; the argument advanced successfully in resisting the appeal of the second plaintiff was never raised in the Courts below. There will be the usual consequential order for the refund of the plaintiffs or their solicitors of the amount deposited as security for costs of the defendant.

Sinnathuray J. (dissenting): The appeal arises from a claim made in the District Court by the appellants against the respondent for damages for negligence arising out of a road accident in which the first appellant, a young boy, was knocked down and injured by a lorry driven by the respondent. At the conclusion of the hearing in the District Court, on the two versions of the accident before him, that of the first appellant and the respondent, the learned District Judge found that the respondent's version was the more probable one and dismissed the appellants' claim. Against that decision, the appellants appealed to the High Court. Kulasekaram J. also dismissed the appeal, this time on the ground that the respondent was not travelling at an excessive speed at the time of the accident and was not in any way negligent. It is against this decision that the appeal has been brought.

The first appellant was at the time of the accident 8 years old. He lived with his parents along a rural road at No. 96 Sungei Tengah Road in Chua Chu Kang. To go to school he has to cross this road to catch the school bus. He said that on January 15, 1981, at about 11.00 a.m. he came out of his house, looked and saw no traffic on the road, and then walked across the road. He was sure he did not run across the road. When he got to the other side of the road, he was knocked down and lost consciousness. At that time he was standing on the grass verge and not on the road. He was not facing the lorry. His left thigh was injured. In cross-examination he first said that the nearside front

part of the lorry hit him; later he said he was not aware that he was knocked down by a lorry. In answer to the Court, he said he was alone that day.

The respondent's version was as follows:

"On January 15, 1981 I was driving lorry number YA 9087D along Sungei Tengah Road going towards Chua Chu Kang. I was on the left side of the road. I don't know how far from the grass I was driving. I horned. I saw nobody in front. I was travelling at 40 mph. I never looked. I don't know whether on my lorry it's kmph or mph. I was travelling slowly. I went up. I saw a boy. I could not – but I swerved, went to left to the grass. The boy ran, I can't see. He ran very fast. I could not see. He ran from here. (Indicates from right to left). When the boy ran I was about this distance away.
(*Court:* About 1½ metres away). When I saw boy running I applied my brakes, I could not stop. I swerved to left and went to the grass. I turned very fast. I applied brakes and turned. When I hit the boy, I was already on the grass.

...

I hit the boy in front on the right front of my vehicle. The right front of my lorry was damaged. The front right portion of my lorry, the van, hit the boy above the lights. When lorry stopped, I came down. I saw a small girl, I think the boy's sister. This girl was running behind the boy.

...

I horned and I went ahead. On the right side of the road there were trees, vegetables. There was small road on right. I could not see this small road.

What the boy said is not true, he was not standing when I collided into him."

The respondent was unshaken in his cross-examination; in answer to questions, he explained further as follows:

"Q. How many times did you horn?
A. One time only.

Q. Why did you want to horn?
A. I thought car coming from other side. Cars can come up and down. It was at corner, bend, I horned.

...

Q. Why swerve left?
A. I braked. The boy ran. I turned left. I could not stop. That's why I swerved left.

Q. Why did you not swerve right?
A. If I turned right he would die."

In considering these two versions, the learned District Judge who heard the case said in his Grounds of Judgment: "The question was who was negligent? Was it the infant plaintiff or the defendant?" He then analysed the evidence before him.

The learned District Judge observed that the respondent was a naive and simple person. He had attended school up to primary 5 but had only passed primary 3. He was not articulate in speech, and appeared to be a dull person. On the respondent's version of the accident, the learned District Judge said:

"He was not speeding. He said he negotiated a bend before reaching the spot where the collision occurred. His view to the front was obstructed by thick vegetation on the side of the road and he sounded his horn. All of a sudden the infant plaintiff dashed across the road about 1½ metres away to his front. He jammed on his brakes and swerved left to avoid colliding into the infant plaintiff. Having regard to the circumstances what the defendant did was what that could be expected from a reasonable driver. He was certainly not negligent."

The learned District Judge also found that the respondent's version was supported by independent evidence. The police sergeant who inspected the lorry soon after the accident saw the offside front signal light cracked and the offside front portion near the cracked signal light dented. The damage to the lorry was consistent with the evidence of the respondent that when the impact took place the first appellant was on the offside of the lorry and not on the nearside as alleged by him. The police also found bloodstains on the road which put beyond doubt that the first appellant was hit by the lorry when he was running across the road and not whilst he was standing on the grass verge.

At the hearing of the appeal, the submission for the appellants was that the respondent was driving at an excessive speed that day. Counsel relied on the evidence-in-chief of the respondent that he was travelling at 40 mph (approximately 64 kmh). He said that that speed was in excess of both the maximum authorised speed of the lorry and the speed limit along Sungei Tengah, which in each case was 50 kmh.

I cannot accept this submission. It is not correct to say that the respondent was driving the lorry at 40 mph. As I read the record of evidence, the respondent did not know at what speed he was travelling. It was only his estimate that he was doing 40 mph. The evidence of 40 mph, referred to by counsel, has been taken out of the context of the evidence of the respondent which was as follows:

"I was travelling at 40 mph. I never looked. I do not know whether on my lorry it is kmh or mph. I was travelling slowly."

This evidence of the respondent must be considered with his other evidence on which the learned District Judge found as a fact that the respondent "was not speeding." On a review of the evidence in the High Court, Kulasekaram J. concluded that the respondent was not travelling at an excessive speed that day. Here, one must recall that just before the accident the respondent was travelling along a rural road; he had negotiated a bend to the left with the road sloping upwards; he saw thick vegetation in front of him on the side of the road; he sounded his horn to warn others of his approach; and whatever was the speed, he was travelling slowly. Taking the totality of the evidence, I am of the view that there was ample evidence before the learned District Judge who heard and saw the respondent give evidence to find, as he did, that the respondent was not speeding.

Next, even if the respondent was travelling at about 40 mph, that by itself is not an act of negligence, though it would be an element to prove negligence. On the facts that the first appellant ran across the road, that the respondent suddenly came upon the first appellant at the top of the slope of the road, that he jammed the brakes and swerved the lorry to the left and not to the right to avoid the first appellant, all prove, to my mind, that the respondent had full control of the lorry. I agree with Kulasekaram J. that the respondent was not in any way negligent.

Another ground of appeal was that the learned District Judge had failed to properly consider the length of the brake marks of the lorry and had failed to draw the proper inferences from them. The complaint was that the evidence of the respondent was inconsistent with the evidence of the brake marks in that if the respondent had swerved as he claimed, then the curve of the brake marks would be more pronounced than shown on the sketch plan.

The brake marks shown on the sketch plan are 17 m (approximately 56 feet) in length. They trace the path of the lorry from the road to the grass verge; admittedly, they are not markedly curved. But the markings on a sketch plan are only rough estimates. On this sketch plan, it is to be noted that the tyre marks of the lorry at "J" and "K" start about 25 feet away from "C" and "D" which denote the "edges of entrance to house". Though there is no evidence of it, it is reasonable to infer that this is the house where the first appellant lived with his parents. It is also to be noted that the lorry came to a stop, about another 25 feet away from "C" and "D." To my mind, these facts support the case for the respondent that the first appellant came out of the house and dashed across the road. It may be that he heard the sound of the horn and thought that it was his school bus.

Then again, as regards the tyre marks of 56 feet, they indicate that the respondent could not have been driving his lorry at 40 mph as the overall stopping distance would then have been about 120 feet. The tyre marks show that at the material time the respondent was driving his lorry at about 25 mph: see the Highway Code in England referred to in *Bingham's* Motor Claims Cases, 9th Edition, 1986 at page 121. Here, it is relevant to recall the evidence of the respondent that he did not know whether the speedometer of his lorry recorded the speed in mph or in kmh and, his further evidence, that at the material time he did not look at the speedometer and had only estimated that he was travelling at 40 which the learned District Judge recorded as "mph." Bearing in mind that we in Singapore had converted to metric years ago, it was most improbable that the speedometer of the lorry was in mph. I am of the view that the evidence in the record is consistent with the respondent travelling at 40 kmh, *i.e.* about 25 mph, and not that he was doing 40 mph. So, on the sketch plan, the conclusion I come to is that the tyre marks corroborate the evidence of the respondent that he was not speeding that day. I would not therefore disturb the concurrent findings of the Courts below.

As I view this appeal, the real issue is where did the accident occur. In this regard, the issue is not dissimilar to the issue that was before the Privy Council in *Muthusamy* v. *Ang Nam Cheow.*[2] In that case –

> "The appellant said it occurred on his side of the road near the broken centre white line when the motor cycle shot across the road. At first the respondent said it occurred when he was three to four feet on the main road after passing the stop sign, that is on the appellant's side of the road, but he later changed his story and said it occurred after he had crossed the broken centre white line implying that the appellant went to the wrong side of the road and collided into him."

This Court allowed the appeal on the ground that

> "the trial judge was wrong in his finding that the accident occurred after the respondent had crossed the broken centre white line and had straightened his motor cycle and that it was a head on collision."

The Privy Council in turn allowed the appeal and

restored the decision of the trial Judge. The Board said:

"It is of course true to say that an appeal to a Court of appeal is a rehearing of the case. But much authority goes to show that such a court is, and indeed should be, much fettered in practice in its ability to disagree with findings of a trial judge in matters of this kind, particularly when they are restricted to the judge's notes of the evidence given, and given through an interpreter, and particularly when the judge has formed the opinion from the manner in which one of the parties has given his evidence that he was lying."

Another approach to this appeal would be to consider whether the appellants have proved the case on a balance of probabilities. Here, I am reminded of the words of Lord Diplock in *Peter Thomas Mahon* v. *Air New Zealand & Ors.*[3]:

"Where facts are in dispute in civil litigation conducted under the common law system of procedure, the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation."

In the present case, at the close of the appellants' case, on the evidence of the first appellant that he was standing on the grass verge when he was collided into by the lorry, the learned District Judge found that a *prima facie* case had been made that he heard the defence. On the respondent's version of the accident that the first appellant suddenly dashed across the road that he had to jam his brakes and swerve to the left, at the close of the whole case, the learned District Judge was bound to consider on a balance of probabilities the evidence of the two versions before him. He rejected the case for the appellants. I am of the opinion that the learned District Judge had correctly applied the "rules as to onus of proof" when he dismissed the appellants' claim. For the reasons I have given, I would dismiss this appeal.

Appeal allowed.

Solicitors: *Wee Ramayah & Partners ; Goh Poh & Partners.*

HIAP HONG & CO. PTE. LTD. v. HONG HUAT CO. (PTE.) LTD.

[O.C.J. (Wee Chong Jin C.J.) May 24, 1985]
[Singapore – Suit No. 95 of 1984]

Contract – Building contract – Money due on "Penultimate Certificate of Payment" issued by architects – Meaning of "Penultimate" – Whether Interim Certificate or Final Certificate.

Architects – Building contract – Money due on "Penultimate Certificate of Payment" issued by architects – Meaning of "Penultimate" – Whether Interim Certificate or Final Certificate.

The plaintiffs/contractor claimed against the defendants/employer the sum of $572,729.91 being money due on a payment certificate stated to be a "PENULTIMATE Certificate of Payment" dated December 6, 1983 issued by the Employer's Architects pursuant to a building contract dated January 27, 1979, made between the Contractor and the Employer. Under the said building contract, the Employer agreed in consideration of the Contractor erecting and completing a shopping centre, *inter alia*, to pay to the Contractor within 30 days from the date of the Certificates issued by the Employer's Architects thereunder such sums as should be certified as being due to the Contractor thereon.

Under Clause 30 of the contract the architects had to issue monthly an Interim Certificate of Payment and the Employer must pay the amount certified within 30 days and when the requirements of Clause 30(6) had been complied with the architects had to issue the Final Certificate. There was no express provision for the issue of a "penultimate" Certificate of Payment.

The crucial question in this appeal was whether or not the certificate issue by the Architects dated 1983 was an Interim Certificate within the meaning of Clause 30 of the contract.

Held, allowing the appeal: (1) a payment certificate cannot be a Final Certificate unless the architect intends it to be a Final Certificate;

(2) the term "penultimate" used by the architects in the Certificate of Payment means the last but one certificate under the contract;

(3) in the present case the certificate was an interim payment certificate governed by Clause 30(1) of the building contract.

CIVIL SUIT.

W.E. Jansen for the plaintiffs.

M. Karthigesu (*Richard Sam* with him) for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal against the decision of the Assistant Registrar granting the defendants' application to stay further